IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 1014

ROSE K. HARRIS, EDYTHE K. SHEARER, and RUTH BOURKE, suing on behalf of themselves and all others similarly situated, and UNITED BAR SERVICE, INC., and SEYMOUR DAMBERT and PHILIP DERMAN, as co-partners doing business under the name and style of DAMBERT & DERMAN, suing on behalf of themselves and all others similarly situated,
Petitioners,

v.

CITY OF NEW YORK, & ORS., & C., *Respondents*,

FORDHAM UNIVERSITY, & ORS.,
Intervening Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	4
Statement of the Case	4
A. The Parties	4
B. The "Lincoln Square" Urban Renewal Plan	5
C. Court Proceedings	9
D. Statement Under Supreme Court Rule 23(f)	10
Reasons for Granting the Writ	11
I. The New York Court of Appeals Has Decided Federal Questions of Substance Not Heretofore Determined by This Court	13
II. The New York Court of Appeals Has Decided Federal Questions of Substance in a Way Probably Not in Accord With the Applicable Decisions of This Court	21
Conclusion	23
Appendix "A"	26
Appendix "B"	35
Appendix "C"	40

CITATIONS

Cases:

Berman v. *Parker*, 348 U.S. 26 ..... 16, 17, 20
Brown v. *United States*, 263 U.S. 78 20
Everson v. *Board of Education*, 330 U.S. 1 ..... 20, 23
Loebner v. *City of New York*, — Misc. 2d —, 162 N.Y.S. 2d 233 7
McCollum v. *Board of Education*, 333 U.S. 203 23
United States v. *Miller*, 317 U.S. 369 19
Zorach v. *Clauson*, 343 U.S. 306 23

CONSTITUTION AND STATUTES: Page

United States Constitution:

First Amendment 3, 4, 12, 14, 15, 21, 23
Fourteenth Amendment 3, 4, 12, 14, 15, 19, 21, 23

Housing Act of 1949, 63 Stat. 413, as amended, 42 U.S.C. § 1441, *et seq.* 3, 4, 5, 11, 12, 13, 14, 15, 16, 21
Housing Act of 1949, Title I, as amended, 68 Stat. 622, 42 U.S.C. § 1450, *et seq.* 11, 21
Housing Act of 1949, Section 103(c)(4), as amended, 70 Stat. 1097, 42 U.S.C. § 1460(c)(4) 15

General Municipal Law of New York

Section 51 5
Section 72-k 3, 4, 7, 8, 12, 14, 15, 19, 21

New York Rules of Civil Practice

Rule 106 10
Rule 112 10
Rule 113 10

MISCELLANEOUS:

H. Rep. No. 590 on H. R. 4009, 81st Cong., 1st Sess. (1949) 13
H. Rep. No. 1429 on H. R. 7839, 83d Cong., 2d Sess. (1954) 13
S. Rep. No. 84 on S. 110, 81st Cong., 1st Sess. (1949) 13
S. Rep. No. 1472 on H. R. 7839, 83d Cong., 2d Sess. (1954) 13

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ROSE K. HARRIS, EDYTHE R. SHERRICK, and RENEE BOURET, suing on behalf of themselves and all others similarly situated, and UNITED BALL BEARING CO., INC. and SEYMOUR DAMBROT and PHILIP DERMAN, as co-partners doing business in the name and style of DAMBROT & DERMAN, suing on behalf of themselves and all others similarly situated, *Petitioners,*

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CITY OF NEW YORK, & ORS., & C., *Respondents,*

FORDHAM UNIVERSITY, & ORS., *Intervenors-Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Rose K. Harris, Edythe R. Sherrick, Renee Bouret, United Ball Bearing Co., Inc., Seymour Dambrot, and Philip Derman, petitioners herein, pray that a writ of certiorari be issued to review the judgment of the Court of Appeals of the State of New York entered on May 1, 1958, which affirmed the judgment of the Appellate Division, Supreme Court, State of New

York, First Judicial Department, entered February 20, 1958, affirming, without opinion, the judgment of Special Term, New York Supreme Court, New York County, entered December 30 1957, granting respondents' motion for summary judgment and dismissing petitioners' complaint.

OPINIONS BELOW

The opinion of the New York Court of Appeals has not been officially reported, but is set out in Appendix "B," *infra*, pp. 35-39.[1] The opinion of Special Term, New York Supreme Court, New York County has not been officially reported, but is set out at R.[2] 200-207.

JURISDICTION

The judgment of the New York Court of Appeals was entered on May 1, 1958. Also, on that date the remittitur of the Court of Appeals was issued to the New York Supreme Court, New York County. Appendix "C," *infra* at p. 40. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1257 (3).

QUESTIONS PRESENTED

(1) Was the action of the Board of Estimate of the City of New York on November 26, 1957 (a) approving the Lincoln Square Urban Renewal Project Plan, (b) approving the project redevelopment contracts,

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[1] The Appellate Division, New York Supreme Court, First Judicial Department, did not write an opinion. Its order affirming the judgment of Special Term is set forth at pp. 212-214 of the Record as printed for the use of the Court below and is reported at — App. Div. 2d —, 170 N.Y.S. 2d 993.

[2] The letter "R" refers to the pages of the record as printed for the use of the Court below.

(c) authorizing the acquisition of the project area by condemnation, and (d) authorizing the sale of the project area in accordance with said plan, in violation of the "establishment of religion" clause of the First Amendment, and the due process clause of the Fourteenth Amendment of the United States Constitution?

(2) A "re-use restriction" for "educational purposes" of part of the Lincoln Square Urban Renewal Project area was specifically adopted upon the agreement of Fordham University—a Roman Catholic Institution—to act as sponsor and redeveloper of that portion of the project. The negotiated price of the land was higher than the "re-use" value of the property in the light of the "restriction" adopted for Fordham's "re-use," but was less than "acquisition cost." Was the action of the Board of Estimate of the City of New York, in condemning the project plan area and in selling to Fordham that portion reserved for "educational purposes" at a previously negotiated price approximately 3½ million dollars less than the price to be paid for that part by the City in violation of the due process clause of the Fourteenth Amendment to the United States Constitution?

(3) Was the action of the Board of Estimate of the City of New York, as set forth in Question (2), above, the taking of private property for a non-public use in violation of the Fourteenth Amendment to the United States Constitution?

(4) Both the Special Term, New York Supreme Court, New York County, and the New York Court of Appeals, construed Title I of the "Housing Act of 1949," 63 Stat. 413, as amended, 42 U.S.C. § 1441, *et seq.*, and Section 72-k of the New York General

Municipal Law, as permitting a religious institution to participate in an urban renewal redevelopment project on the basis of a previously negotiated price, approximately 3½ million dollars less than the price to be paid by the City (two-thirds of which will be borne by the Federal Government). As construed by the New York Court of Appeals:

> (a) Is Title I of the "Housing Act of 1949," 63 Stat. 413, as amended, 42 U.S.C. § 1441, *et seq.*, unconstitutional as a violation of the First Amendment to the United States Constitution:
>
> (b) Is Section 72-k of the New York General Municipal Law unconstitutional as a violation of the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions involved are the First and Fourteenth Amendments to the Constitution of the United States. The statutes involved are Title I of the "Housing Act of 1949," 63 Stat. 413, as amended, 42 U.S.C. § 1441, *et seq.*, and Section 72-k of the New York General Municipal Law. All Constitutional and statutory provisions are set forth in Appendix "A," *infra*, at pp. 26-35.

STATEMENT OF THE CASE

A. The Parties.

Petitioners are residential and business tenants in the so-called "Lincoln Square" project area on the West Side of Manhattan, which runs from 60th Street to 70th Street, is bounded on the east and west by various streets, and consists altogether of 13 city blocks.

On November 29, 1957 petitioners instituted this litigation to enjoin the City of New York and certain city officials from taking further action with respect to the Lincoln Square Urban Renewal plan and to obtain a declaratory judgment that the plan was in violation of both Federal and State Constitutions.[3] Respondents are the City of New York, various members of the City's Board of Estimate, and Robert Moses, Chairman of the City's Committee on Slum Clearance. Fordham University, the Lincoln Center for the Performing Arts, Inc., and Webb & Knapp Lincoln Square Corporation intervened below (R. 2), and are designated here as "intervenors-respondents."

B. The "Lincoln Square" Urban Renewal Plan.

On April 19, 1954 the Committee on Slum Clearance of the City of New York (hereinafter referred to as "Committee") requested authority from the New York City Board of Estimate (hereinafter referred to as "Board of Estimate") to obtain Federal Funds under Title I of the "Housing Act of 1949" for an urban renewal study of the Lincoln Square area. In October, 1955, after obtaining Federal planning funds, the Committee solicited sponsors to redevelop the area (R. 14, 106). One of the sponsors was Fordham University, which assured the City that it would purchase a site in excess of 300,000 square feet for collegiate purposes (R. 30). Preliminary bids for tentative sponsorship were closed on October 17, 1955 (R. 169), and rede-

[3] 64th Street Residences, Inc., and 89 Amsterdam Avenue Corp., who had brought suit in a "tax-payer's action" under Section 51 of the New York General Municipal Law (R. 10), and who along with petitioners were plantiffs-appellants below, are not included as "petitioners" here. Petitioners either reside or do business in that area which was condemned by the City and then sold to Fordham University (R. 18-20).

velopment and site plans were formulated on the "reuse" basis required by the tentative sponsors (R. 14-15, 34, 149-153, 155-157).

On May 28, 1956 the Committee submitted a report to both the Mayor and the Board of Estimate in which Fordham University was designated as the tentative sponsor for the area bounded by West 60th Street, Amsterdam Avenue, West 62nd Street and Columbus Avenue (R. 149-150).[4] On September 27, 1956 the Board of Estimate granted the Committee authority to present and further process the plan with the Federal Urban Renewal Administration. In granting this authority, the Board acted upon the aforesaid Report and upon a communication from the Chairman of the City Planning Commission, which stated:

> "The proposed redevelopment plan includes the provision of an educational site for the Fordham University Downtown Center, comprising the schools of Law, Education, Business and Social Service. Adjacent to this development there is to be established a musicial and entertainment center including an opera house, a concert hall and several theatres * * *. The plan includes a housing development comprising twelve 20-story buildings providing a total of 4,080 dwelling units." (R. 173).

The site plan set forth in the Committee Report of May 28, 1956 contained the designation "Fordham University" for the area bounded by West 60th Street, Columbus Avenue, West 62nd Street and Amsterdam

[4] The report stated that Fordham University would erect a group of school buildings, comprising the schools of law, education, business and social service, on that site (R. 150)

Avenue (R. 149-150), but no reference, as such, to a "collegiate site" or "educational site."

In November, 1956, persons, other than petitioners, instituted litigation to enjoin further processing of the plan on the basis of Fordham University's participation,[5] at which point the Committee advised Skidmore, Owings & Merrill, coordinating architects for the project, to delete the name of Fordham University from the Site Plan which was being republished as part of a relocation brochure being issued by the Committee for the information of owners and tenants withing the area (R. 152).[6] On August 22, 1957, the Board of Estimate referred the final plan to the City Planning Commission and, after public hearings, on September 11, 1957, the Commission approved the project as an entity and made the findings required by Section 72-k of the New York General Municipal Law (R. 29). Approval was issued in a report of the City Planning Commission dated October 2, 1957 (R. 29, 75).[7]

On October 25, 1957 the Board of Estimate held public hearings on the final approval of the project. On

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[5] See, *Loebner* v. *City of New York*, —— Misc. 2d ——, 162 N.Y.S. 2d 233, dismissed as premature on March 6, 1957.

[6] Similar instructions were given for the deletion of the name of St. Matthew's Roman Catholic Church, another sponsor whose participation was made the basis of a challenge in the *Loebner* case (op. cit., *supra*, ftn. 5), and substitution of the word "institution" (R. 152).

[7] However, in this report, the Site Plan, reproduced as an appendix thereto, redesignated the area bounded by West 60th Street, Columbus Avenue, West 62nd Street and Amsterdam Avenue as "Fordham University" and "Educational Units," and the building outline originally delineated for St. Matthew's Roman Catholic Church was no longer designated as "institution" but instead as "Church" (R. 43, 152).

November 26, 1957 the Board passed a series of resolutions approving (1) the Lincoln Square Urban Renewal plan in its entirety, (2) the acquisition of the project area, (3) the execution of a capital grant contract with the Federal Government, and (4) approving the sponsorship agreements with the various sponsors, including Fordham University (R. 29, 37-41). The agreement with Fordham University obligated Fordham to bid a minimum amount of $2,241,610 at the public auction, and, if successful, to redevelop the site in accordance with the terms of the redevelopment plan. The sponsorship contract also provided for a purchase money mortgage of 65%, to be given by Fordham to the City of New York, as mortgagee (R. 160). In turn, the City obligated itself to acquire the site by purchase or condemnation and to sell it to Fordham if it was the highest bidder at the public auction held pursuant to Section 72-k of the New York Municipal Law (R. 50, 63, 68).[8]

In addition to the collegiate site, the redevelopment plan for the Lincoln Square Urban Renewal Project contains, along with other area sites, a site for a performing arts center (R. 27). The performing arts center is bounded by West 62nd Street, Amsterdam Avenue, West 65th Street and Columbus Avenue (R. 27). The City of New York entered into a sponsor-

[8] In New York City, the so-called "public auction" is one of form only. In "every previously processed Title I project in the City of New York," and in the Lincoln Square Project, as well, not only did the sponsor" * * * [purchase] the site specified in the sponsorship contract at the public auction for the amount set forth in the sponsorship contract," but in addition "there has never even been a bidder other than the designated sponsors." These facts, alleged on p. 31 of the Record, have never been challenged by respondents.

ship agreement with Lincoln Center for the Performing Arts, Inc. (R. 101), which agreed to bid at least $3,993,677.20 at the public auction. The sponsorship agreement and conditions of sale required redevelopment by the erection of a concert hall and an opera house. The negotiated minimum agreed bid for the performing arts center was $10.60 per square foot. The negotiated minimum agreed bid for the collegiate center was $7.00 per square foot (R. 130). On December 26, 1957, the Federal Housing and Home Finance Agency granted approval to the plan, and on February 28, 1958 the City obtained title to the Lincoln Square site by order of condemnation. On the afternoon of February 28, 1958 the City auctioned the "collegiate," "performing arts," and other area sites. The only bidders were the designated sponsors. The amounts bid were the minimum prices previously established by the sponsorship agreements.[9] The approximate cost of site acquisition, as estimated by the Committee on Slum Clearance, is $16.00 per square foot (R. 15, 75).

Respondents concede that Fordham University is conducted by members of the Society of Jesus, a religious order of the Roman Catholic Church, and that while enrollment is not limited to students of the Catholic Faith, courses in the Catholic Religion are conducted in certain of its schools (R. 73, 105, 118).

C. Court Proceedings.

On November 29, 1957 petitioners moved, in Special Term, New York Supreme Court, New York County, for a temporary injunction restraining respondents

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[9] It could hardly have been otherwise. Op. cit., *supra*, ftn. 8. The City was well aware that Fordham University would be the only educational institution to bid for the collegiate site (R. 153).

from acquiring the Lincoln Square area by condem
tion or otherwise. Service of the summons and co
plaint was made December 2, 1957 and answers w
served December 9, 1957. By separate orders dat
respectively December 9 and December 12, 1957,
spondents-intervenors, Fordham University, Linc
Center for the Performing Arts, Inc., and Webb
Knapp Lincoln Square Corporation, were permitt
to intervene in the action and to serve answers to t
complaint (R. 2).

Respondents thereupon moved for dismissal of t
complaint, judgment on the pleadings, and summa
judgment pursuant to Rule 106, 112 and 113 of the N
York Rules of Civil Practice. Petitioners cross-mov
for summary judgment pursuant to Rule 113 of t
New York Rules of Civil Practice. On December 2
1957 the Special Term of the New York Supreme Cou
New York County, granted respondents' motion f
summary judgment and dismissed petitioners' co
plaint (R. 207). On February 20, 1958 the Appella
Division of the New York Supreme Court, First Jud
cial Department, unanimously affirmed, without opi
ion (R. 212-214), and on May 1, 1958 the New Yo
Court of Appeals, in a written opinion annexed here
as Appendix "B" *infra*, at pp. 35-39, affirmed th
determination of the Appellate Division.

D. Statement Under Supreme Court Rule 23(f).

The Federal questions which petitioners ask thi
Court to review were specifically raised, in the firs
instance, in paragraphs Eighteenth through Twenty
eighth of the complaint (R. 17-22),[10] and in the affidavi

[10] Except Queston 4, which is raised by the constitutional cha
lenge to the statutes *as applied*, *i.e.*, to the Lincoln Square Urba

of Sidney Diel-stein, submitted in support of petitioners' motions for temporary injunction and summary judgment (R. 25-26, 31-32, 34-36). The opinion of the Special Term of the New York Supreme Court, New York County, specifically ruled on all the Questions Presented for review by this Court (R. 200-207). The Appellate Division of the New York Supreme Court, First Judicial Department, affirmed the ruling of the Special Term without opinion (R. 212-214). All the questions presented were raised in the memoranda of law submitted by petitioners to Special Term, and in the briefs submitted to the Appellate Division and the Court of Appeals. Similarly, the opinion of the New York Court of Appeals, annexed hereto as Appendix "B", *infra*, at pp. 35-39, deals with all of the questions presented in this Petition for Certiorari.[11]

REASONS FOR GRANTING THE WRIT

The issues which this Court is asked for the first time to decide arise from Title I of the "Housing Act of 1949," 63 Stat. 413, as amended, 42 U.S.C. § 1441, *et seq.*, and raise questions of fundamental importance to the Government of the United States, various state and municipal governments, our democratic society, and thousands of real property owners and residental and business tenants who are and will

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Renewal Project "being carried on pursuant to the provisions of Title I of the Federal Housing Act of 1949, as amended, 42 U.S.C. § 1450, *et seq.*, and § 72-k of the General Municipal Law of the State of New York" (R. 26). These allegations are set forth in paragraphs Third, Fourth and Eighteenth of the complaint (R. 11-12, 17).

[11] For pertinent quotations of specific portions of the rulings of the Court below, see Point I(1), (2) and (3), *infra*, at pp. 15, 18, 20, Point II(1), *infra*, at pp. 21-22.

be affected thereby. The decision of the New York Court of Appeals permits the City of New York to condemn an area as "substandard and unsanitary," and to sell a part thereof to a Roman Catholic institution at a previously negotiated price approximately 3½ million dollars less that the price to be paid by the City. Petitioners, and hundreds of others, are immediately affected, for to make way for a new campus for Fordham University—a Roman Catholic institution, they are now required either to vacate their respective homes and premises, or to lose their respective businesses (R. 18-20).

The three basic constitutional questions involved in this case are (1) whether in the light of the First and Fourteenth Amendments a religious institution is prohibited from participating in an urban renewal redevelopment project under Title I of the "Housing Act of 1949," 63 Stat. 413, as amended, 42 U.S.C. § 1441, *et seq.*, and Section 72-k of the New York General Municipal Law, unless it pays the full acquisition cost of that portion of the project it obtains; (2) whether *in the circumstances of this case (i.e.*, where (a) a "re-use" restriction for "educational purposes" of part of the project area was specifically adopted upon the religious institution's agreement to act as sponsor and redeveloper of that portion of the project, and (b) the price negotiated between the City and the religious institution was higher than the "re-use" value of the real property in the light of the "re-use" restriction adopted as aforesaid, but lower than the property's "acquisition cost"), the principles underlying the doctrine of "separation between church and state" prohibited the sale by the City of the property to the religious institution at less than the cost

of acquisition; and (3) whether *in the circumstances of this case* (*i.e.*, where (a) the "re-use" restriction for "educational purposes" of a portion of the project area was adopted solely upon the religious institution's agreement to act as sponsor and redeveloper of that portion of the project, and (b) the City knew that no other educational institution would bid for the restricted site at the public auction), the condemnation of the project area and the auction at which the religious institution was the only bidder (at the previously negotiated price) constituted the taking of private property for a non-public use in violation of the Fourteenth Amendment to the Constitution.

I

The New York Court of Appeals Has Decided Federal Questions of Substance Not Heretofore Determined By This Court.

Under Title I of the "Housing Act of 1949," 63 Stat. 413, as amended, 42 U.S.C. § 1441, *et seq.*, Congress attempted to meet the problem of slum clearance by *subsidizing* the cost of clearing blighted or deteriorating land in central areas of theNation's major cities on a two-to-one sharing formula, "the Federal Government making up two-thirds of the loss and the local government making up one-third." *S. Rep. No. 84 on S. 110*, 81st Cong., 1st Sess., at p. 13 (1949). The purpose of "Title I" was to subsidize and encourage private enterprise to clear and redevelop slum areas.[12] And while the expenditure of Federal and

[12] *S. Rep. No. 84 on S. 110*, 81st Cong., 1st Sess., pp. 10-15 (1949); *H. Rep. No. 590 on H. R. 4009*, 81st Cong., 1st Sess., pp. 13-17 (1949); *S. Rep. No. 1472 on H. R. 7839*, 83rd Cong., 2d Sess., pp. 35-41 (1954); *H. Rep. No. 1429 on H. R. 7839*, 83d Cong., 2d Sess., pp. 22-25 (1954).

municipal funds, and the use of the municipality's power of eminent domain, to accomplish slum clearance and redevelopment is unquestionably in the public interest, implicit in these expenditures, as well as in the power of eminent domain, is the subsidy and benefit which private redevelopers receive as a result of Federal and state action.

Petitioners contend that the participation of Fordham University in New York City's "*Lincoln Square* Urban Renewal Project," both by reason of Title I of the "Housing Act of 1949" and Section 72-k of the New York General Municipal Law, was a direct violation of the "establishment of religion" clause of the First Amendment, and the "due process" clause of the Fourteenth Amendment. In the face of this challenge, the New York Court of Appeals held the City's action valid, stating that while "[Fordham], of course, [is] getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay if it had to negotiate with all the private owners * * * [t]he city benefits by the achievement of its valid municipal purpose of eliminating a slum." Appendix "B," *infra*, at pp. 38-39. Whether or not the City benefits by eliminating a slum area, we think (1) that the principles underlying the doctrine of "separation between Church and State" prohibited the sale of part of that slum to a Roman Catholic institution at a negotiated price, approximately 3½ million dollars less than the price to be paid by the City (especially where two-thirds of the 3½ million dollar loss will be borne by the Federal Government), and (2) that as construed by the Court below, Title I of the "Housing Act of 1949," 63 Stat. 413, as

amended, 42 U.S.C. § 1441, *et seq.* and section 72-k of the New York General Municipal Law are unconstitutional as being in violation of the First and Fourteenth Amendments, respectively.

(1) The New York Court of Appeals held that under Title I of the "Housing Act of 1949" and Section 72-k of the New York General Municipal Law a sale to a religious institution "at $7 per square foot of *land for which* the City [will pay] about $16 per square foot would [not] be an unconstitutional grant or subsidy to a religious corporation." Appendix "B," *infra*, at p. 38. The Court said:

> "The State and Federal statutes contemplate that the purchaser from the city will pay less than the city has paid since it will always be the case that the city is buying land and buildings and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes." Appendix "B," *infra*, at p. 39.[13]

The question, whether, in the light of the First and Fourteenth Amendments a religious institution is prohibited from participating in an urban renewal redevelopment project under Title I of the "Housing Act of 1949" and Section 72-k of the New York General

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[13] Section 103(c)(4) of the "Housing Act of 1949," as amended, permits the City to dispose "of any property acquired in the urban renewal area * * * at its fair value for uses in accordance with the urban renewal plan." 70 Stat. 1097, 42 U.S.C. § 1460 (c)(4). Section 72-k of the New York General Municipal Law authorizes the City to dispose of such property "at the highest marketable price," the deed or instrument of conveyance requiring the purchaser "to clear, plan, reconstruct or rehabilitate such property in such manner as may be prescribed by the Board of Estimate * * *."

Municipal Law (unless it pays the full acquisition cost of that portion of the project it obtains), is in our view, *a Federal question of substance not heretofore decided by this Court.*

The urban renewal and redevelopment program established by Title I of the "Housing Act of 1949," as amended, was the outgrowth of five years of Congressional investigation as to the "persistence of widespread slums and blighted areas in cities, large and small, throughout the Nation."[14] The question decided by the New York Court of Appeals affects not only "cities, large and small, throughout the Nation" but it raises a serious and basic constitutional problem involving the "establishment of religion" clause of the First Amendment. Directly affected is the Federal Government, which will be required to shoulder two-thirds of a direct subsidy of about 3½ million dollars to a religious institution. Property owners, and business and residential tenants in various cities throughout the Nation, will be affected, too.

The important constitutional question passed on by the highest Court of New York requires an accommodation of the power of Congress to aid cities in eliminating slums and blighted areas and to provide standards for redevelopment on a balanced and integrated community basis with principles embodied in the "establishment of religion" clause of the First Amendment. In *Berman* v. *Parker*, 348 U.S. 26, this Court said that it was within the power of Congress to authorize the District of Columbia Land Redevelopment Agency to attack the problem of slum clearance on an area or regional basis and to redesign the area

[14] *S. Rep. No. 84 on S. 1070*, 81st Cong., 1st Sess., p. 19 (1949).

"so that a balanced integrated plan could be developed for the region, including not only new houses, but also schools, *churches,* parks, streets, and shopping centers." *Id.,* at pp. 34-35 [Emphasis supplied]. But equally important is what this Court did not say. *Berman* v. *Parker* does not hold that in developing a balanced intergrated plan for the region, the District of Columbia Land Redevelopment Agency could sell a portion of the community redevelopment project to a *church* "at $7 per square foot of land for which the [Agency will pay] about $16 per square foot * * *." An accommodation of the legitimate powers of the Congress and of the legislative bodies of the various states and cities in attacking the problem of slum clearance and urban redevelopment with the constitutional principle establishing "a wall of separation between church and state" was not made in the *Berman* case. Neither was it made in the decision of the New York Court of Appeals in this case. In our view, an accommodation of these competing, but not necessarily conflicting, interests should be made by this Court. And in making that accommodation, we think this Court will hold that a religious institution may not participate in an urban renewal redevelopment project unless it pays the full acquisition cost of that portion of the project it obtains.

(2) The New York Court of Appeals held that the City's action did not constitute a violation of the constitutional proscription against grants of public moneys to a religious institution despite the fact that (a) a "re-use" restriction of part of the project area was specifically adopted upon the religious institution's agreement to act as sponsor and redeveloper of that portion of the project, and (b) the price negotiated

between the City and the religious institution, while higher than the "re-use" value of the real property in the light of the "re-use" restriction adopted as aforesaid, was lower than the "acquisition cost" of the property obtained. The Court said:

> "Fordham University agreed * * * to bid, for the two-block part set aside for 'educational purposes', at least * * * $7 per square foot, which was higher than the 're-use value' fixed by any of the several appraisals. * * * After the institution of this suit, the city, on February 28, 1958, took title to the project area by condemnation and conducted the auction at which Fordham University was the only bidder (at the previously negotiated price) for that part of the area which had been reserved for collegiate or educational purposes. * * * Plaintiffs say that because the city arranged to sell this land at a price much below what the city [will pay] for it, this necessarily amounts to a subsidy or gift. But what the city bought is not the same as what Fordham bought. The City bought land and buildings * * *. What Fordham was paying for was the re-use value of the land [~~for~~ collegiate purposes] * * * [at] $7 per square foot * * * [a sum] at least equal to the re-use value as established by several appraisals * * *. Therefore * * * Fordham is [not] getting a gift, grant or subsidy of public property. It is, of course, getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay if it had to negotiate with all the private owners, but the private owners are getting from the city the full value of the property in its present condition and use." Appendix "B," *infra*, at pp. 36-38.

In our view, where (a) the "re-use" restriction of a part of the project area for "educational purposes"

was specifically adopted upon Fordham's agreement to act as sponsor and redeveloper of that portion of the project, and (b) the negotiated sale price was higher that the "re-use" value of the property as "restricted" for Fordham's "re-use", but was lower than the "fair market value"[15] of the property (or, in Judge Desmond's words: "at a price which is probably lower than it would have to pay if it had to negotiate with all the private owners * * *," Appendix "B," *infra*, at p. 38), the condemnation of the property by the City and its sale to Fordham for a sum about 3½ million dollars lower than its cost of acquisition was prohibited by the First and Fourteenth Amendments. While the New York Court of Appeals held otherwise, this Federal question of substance is obviously one for this Court to decide.

(3) The New York Court of Appeals held that the condemnation of the project area and the auction at which the religious institution was the only bidder (at the previously negotiated price) did not constitute a taking of private property for a non-public use in violation of the Fourteenth Amendment, regardless of the fact that (a) the "re-use" restriction of a part of the project area for "educational purposes" was adopted solely upon the religious institution's argeement to act as sponsor and redeveloper of that portion of the project and (b) at the time it approved the project plan, the City knew that no other educational institution would bid for the restricted site at the public auction required by Section 72-k of the New

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[15] As used here, the term "fair market value" is synonymous with "acquisition cost." See, *e.g.*, *United States* v. *Miller*, 317 U.S. 369, 374.

York General Municipal Law (R. 153). The Court said:

> "The City benefits by the achievement of its valuable municipal purpose of eliminating a slum. * * * At some points in their argument plaintiffs seem to be questioning the validity of the whole system of selling these properties at auctions where there is little likelihood of competing bids. That contention must be rejected." Appendix "B," *infra*, at pp. 38-39.

This Federal question is one of substance. And while this Court has not heretofore passed on it in the factual context of this case, we recognize that review may be unavailable because of *Berman* v. *Parker*, 348 U.S. 26. If the *Berman* case means that the character of the "non-public use" to which real property is put after seizure is always irrelevant when a valid public purpose is achieved by eliminating a slum, then review of this question has been foreclosed. But if the *Berman* case means that the *taking* of title to real property for a public purpose is within the power of eminent domain, *provided* that the subsequent non-public use to which the property is put is (a) expressly or impliedly authorized and (b) not otherwise invalid, then this Court should review this question. While the judicial role in determining whether the power of eminent domain is being exercised for a public purpose is a narrow one, we think it not so narrow as to permit a *taking* of the private property of one person for the private use of a religious institution even though a public purpose was achieved as an incidental by-product. Cf. *Everson* v. *Board of Education*, 330 U.S. 1, 6-7; *Brown* v. *United States*, 263 U.S. 78, 83-84.

II

The New York Court of Appeals Has Decided Federal Questions of Substance in a Way Probably Not in Accord With the Applicable Decisions of This Court.

(1) This action was instituted in the New York Supreme Court to enjoin the City from taking further action with respect to the Lincoln Square Urban Renewal Project Plan and to obtain a declaratory judgment that the plan was in violation of both Federal and State Constitutions. While no direct attack on the constitutionality of Title I of the "Housing Act of 1949" or Section 72-k of the New York General Municipal Law, was made in petitioners' complaint,[16] those statutes, as construed by the opinion of Mr. Justice McGivern at the Special Term, New York Supreme Court, New York County (R. 200-207), squarely raised the question whether, in the light of the First and Fourteenth Amendments, a religious institution was prohibited from participating in an urban renewal redevelopment project under Title I of the "Housing Act of 1949," and Section 72-k of the New York General Municipal Law (R. 201). Judge McGivern said:

> "The intendment of such statutes is to throw an arm of protection around a whole community and to uplift it, not to ward off some units of the community because of accidental factors such as creed.

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[16] The constitutional challenge was directed to the statutes *as applied*, *i.e.*, to the Lincoln Square Urban Renewal Project "being carried on pursuant to the provisions of Title I of the Federal Housing Act of 1949, as amended, 42 U.S.C. § 1450, *et seq.*, and Section 72-k of the General Municipal Law of the State of New York" (R. 26). These allegations are set forth in Paragraphs Third, Fourth and Eighteenth of the complaint (R. 11-12, 17).

> And assuredly, the intergation of Fordham in such a vast development as Lincoln Square is not a step towards the establishment of a national religion, offensive to the First Amendment of the Federal Constitution. Public welfare legislation, such as the slum clearance law before us and the acts taken thereunder, which extend the general benefit of New York State law 'to all its citizens without regard to their religious belief' are not to be considered as establishments of religion (Everson v. Board of Education, 330 U.S., 1, 16 [1947]). Nor have our courts ever temporized with rejecting arguments that state action was aiding in the establishment of religion where concurrence would result in the encroachment upon the free exercise of religion." (R. 205)

When this issue reached the New York Court of Appeals, that Court held that both the State and Federal statutes contemplated that the purchaser from the City would pay less than the City had paid, since it would "always be the case that the City is buying land and buildings, and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes." The Court of Appeals held the City's action valid, stating that while

> "* * * [Fordham], of course, [is] getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay than if it had to negotiate with all the private owners, but the private owners are getting from the city the full value of the property in its present condition and use. The city benefits by the achievement of its valid municipal purpose of eliminating a slum." Appendix "B", *infra*, at p. 38.

We think it clear that the New York Court of Appeals has decided this Federal question of substance in a way in conflict with the applicable decisions of this Court. See, *Everson* v. *Board of Education*, 330 U.S. 1; *McCollum* v. *Board of Education*, 333 U.S. 203; and *Zorach* v. *Clauson*, 343 U.S. 306.

(2) The New York Court of Appeals held that *in the circumstances of this case* the City's action did not constitute a violation of the doctrine of "separation between church and state," as embodied in the "establishment of religion clause" of the First Amendment, and the "due process" clause of the Fourteenth Amendment. Not only was this ruling a decision on a Federal question of substance not heretofore decided by this Court (see, Point I(2), *supra*, at pp. 17-19), but in our view it was a ruling in conflict with the principles established by this Court in *Everson* v. *Board of Education*, *supra*; *McCollum* v. *Board of Education*, *supra*, and *Zorach* v. *Clauson*, *supra*.

CONCLUSION

The fundamental importance of this case is pointed up by a letter of the Federal Housing and Home Finance Administrator to the Mayor of the City of New York on July 25, 1957. With reference to the Lincoln Square Urban Renewal Project, the Federal Administrator stated:

> "The point at issue concerns the determination of fair reuse value as required by Title I of the Housing Act of 1949 of lands to be sold to redevelopment sponsors in the Lincoln Square project area. As you probably know, this project is still in planning and has not yet been put under Federal capital grant contract. About six months ago, Mr. Moses's staff was advised that this Agency

would require an appraisal by appraisers selected by the Agency, in addition to the usual two appraisals to be submitted by the Committee on Slum Clearance. *We have taken this position because of deficiencies in the first appraisal submitted by the Committee, the large amounts of money involved in the Lincoln Square project, and nation-wide public concern that a religious institution might be publicly subsidized by the sale of land at less than fair value. Moreover, the project proposals do not appear to assure the broad competition for the project sites which would otherwise tend to make certain that fair value would be determined in the market place.*" [Emphasis supplied.] (R. 156-157)

While the concern of the Federal Housing and Home Finance Administrator resulted in an increase in price which Fordham paid for that portion of the project area it obtained, and while the Administrator did grant final approval to the project on December 26, 1957, this letter demonstrates that the issues raised by this case are of "nation-wide public concern." We think the Federal questions of substance presented here for the first time should be resolved by this Court, not merely because the issues are of "nation-wide public concern," but because such issues pose grave legal questions of fundamental importance to the Government of the United States, various state and municipal governments, and thousands of real property owners and residential and business tenants throughout the Nation.

FOR THE FOREGOING REASONS THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX "A"

Constitution

FIRST AMENDMENT

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

FOURTEENTH AMENDMENT

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes

Section 2 of the Housing Act of 1949, 63 Stat. 413, 42 U.S.C. § 1441.

"The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation. The Congress further declares that such production is necessary to enable the housing industry to make its full contribution

toward an economy of maximum employment, production, and purchasing power. The policy to be followed in attaining the national housing objective established shall be: (1) private enterprise shall be encouraged to serve as large a part of the total need as it can; (2) governmental assistance shall be utilized where feasible to enable private enterprise to serve more of the total need; (3) appropriate local public bodies shall be encouraged and assisted to undertake positive programs of encouraging and assisting the development of well-planned, integrated residential neighborhoods, the development and redevelopment of communities, and the production, at lower costs, of housing of sound standards of design, construction, livability, and size for adequate family life; (4) governmental assistance to eliminate substandard and other inadequate housing through the clearance of slums and blighted areas, to facilitate community development and redevelopment, and to provide adequate housing for urban and rural non-farm families with incomes so low that they are not being decently housed in new or existing housing shall be extended to those localities which estimate their own needs and demonstrate that these needs are not being met through reliance solely upon private enterprise, and without such aid * * *. The Housing and Home Finance Agency and its constituent agencies, and any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established, and in such manner as will encourage and assist * * * (4) the development of well-planned, integrated, residential neighborhoods and the development and redevelopment of communities * * *."

Title I, Section 100 of the Housing Act of 1949, as amended, 68 Stat. 622, 42 U.S.C. § 1450.

"The authorizations, funds, and appropriations available pursuant to sections 1452 and 1453 of this title shall constitute a fund, to be known as the "Urban Renewal Fund," and shall be available for advances, loans, and capital grants to local public agencies for urban renewal projects in accordance with the provisions of this subchapter * * * ."

Title I, Section 101 of the Housing Act of 1949, 63 Stat. 414, as amended, 42 U.S.C. § 1451.

"(a) In entering into any contract for advances for surveys, plans and other preliminary work for projects under this subchapter, the Administrator shall give consideration to the extent to which appropriate local public bodies have undertaken positive programs (through the adoption, modernization, administration, and enforcement of housing, zoning, building and other local laws, codes and regulations relating to land use and adequate standards of health, sanitation, and safety for buildings, including the use and occupancy of dwellings) for (1) preventing the spread or recurrence in the community of slums and blighted areas, and (2) encouraging housing cost reductions through the use of appropriate new materials, techniques, and methods in land and residential planning, design, and construction, the increase of efficiency in residential construction, and the elimination of restrictive practices which unnecessarily increase housing costs.

"(b) In the administration of this subchapter, the Administrator shall encourage the operations of such local public agencies as are established on a State, or regional (within a State), or unified metropolitan basis or as are established on such other basis as permits such agencies to contribute effectively toward the solution of community

development or redevelopment problems on a State, or regional (within a State), or unified metropolitan basis.

"(c) No contract shall be entered into for any loan or capital grant under this subchapter * * * unless (1) there is presented to the Administrator by the locality a workable program (which shall include an official plan of action, as it exists from time to time, for effectively dealing with the problem of urban slums and blight within the community and for the establishment and preservation of a well-planned community with well-organized residential neighborhoods of decent homes and suitable living environment for adequate family life) for utilizing appropriate private and public resources to eliminate, and prevent the development or spread of, slums and urban blight, to encourage needed urban rehabilitation, to provide for the redevelopment of blighted, deteriorated, or slum areas, or to undertake such of the aforesaid activities or other feasible community activities as may be suitably employed to achieve the objectives of such a program, and (2) on the basis of his review of such program, the Administrator determines that such program meets the requirements of this subsection and certifies to the constituent agencies affected that the Federal assistance may be made available in such community * * *."

Title I, Section 102 of the Housing Act of 1949, 63 Stat. 414, as amended, 42 U.S.C. § 1452.

"(a) To assist local communities in the elimination of slums and blighted or deteriorated or deteriorating areas, in preventing the spread of slums, blight or deterioration, and in providing maximum opportunity for the redevelopment, rehabilitation, and conservation of such areas by private enterprise, the Administrator may make temporary and definitive loans to local public agencies in accordance with the provisions of this subchapter for the undertaking of urban renewal projects. * * *

"(d) The Administrator may make advances of funds to local public agencies for surveys of urban areas to determine whether the undertaking of urban renewal projects therein may be feasible and for surveys and plans for urban renewal projects which may be assisted under this subchapter, including, but not limited to, (i) plans for carrying out a program of voluntary repair and rehabilitation of buildings and improvements, (ii) plans for the enforcement of State and local laws, codes and regulations relating to the use of land and the use and occupancy of buildings and improvements, and to the compulsory repair, rehabilitation, demolition, or removal of buildings and improvements, and (iii) appraisals, title searches, and other preliminary work necessary to prepare for the acquisition of land in connection with the undertaking of such projects. * * * "

Title I, Section 105 of the Housing Act of 1949, 63 Stat. 416, as amended, 42 U.S.C. § 1455

"Contracts for loans or capital grants shall be made only with a duly authorized local public agency and shall require that—

"(a) The urban renewal plan for the urban renewal area be approved by the governing body of the locality in which the project is situated, and that such approval include findings by the governing body that (i) the financial aid to be provided in the contract is necessary to enable the project to be undertaken in accordance with the urban renewal plan; (ii) the urban renewal plan will afford maximum opportunity, consistent with the sound needs of the locality as a whole, for the rehabilitation or redevelopment of the urban renewal area by private enterprise; and (iii) the urban renewal plan conforms to a general plan for the development of the locality as a whole;

"(b) When real property acquired or held by the local public agency in connection with the project is sold or

leased, the purchasers or lessees and their assignees shall be obligated (i) to devote such property to the uses specified in the urban renewal plan for the project area; (ii) to begin within a reasonable time any improvements on such property required by the urban renewal plan; and (iii) to comply with such other conditions as the Administrator finds, prior to the execution of the contract for loan or capital grant pursuant to this subchapter, are necessary to carry out the purposes of this title * * *;

"(c) There be a feasible method for the temporary relocation of families displaced from the urban renewal area, and that there are or are being provided, in the urban renewal area or in other areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families displaced from the urban renewal area, decent, safe, and sanitary dwellings equal in number to the number of and available to such displaced families and reasonably accessible to their places of employment.

"(d) No land for any project to be assisted under this subchapter shall be acquired by the local public agency except after public hearing following notice of the date, time, place, and purpose of such hearing."

Title I, Section 110 of the Housing Act of 1949, 63 Stat. 420, as amended, 42 U.S.C. § 1460.

"(a) 'Urban renewal area' means a slum area or a blighted deteriorated, or deteriorating area in the locality involved which the Administrator approves as appropriate for an urban renewal project.

"(b) 'Urban renewal plan' means a plan, as it exists from time to time, for an urban renewal project, which plan (1) shall conform to the general plan of the locality as a whole and the workable program referred to in sec-

tion 1451 of this title and shall be consistent with definite local objectives respecting appropriate land uses, improved traffic, public transportation, public utilities, recreational and community facilities, and other public improvements; and (2) shall be sufficiently complete to indicate such land acquisition, demolition and removal of structures, redevelopment, improvements, and rehabilitation as may be proposed to be carried out in the urban renewal area, zoning and planning changes, if any, land uses, maximum densities, and building requirements.

"(c) 'Urban renewal project' or 'project' may include undertakings and activities of a local public agency in an urban renewal area for the elimination and for the prevention of the development or spread of slums and blight, and may involve slum clearance and redevelopment in an urban renewal area, or rehabilitation or conservation in an urban renewal area, or any combination or part thereof, in accordance with such urban renewal plan. Such undertakings and activities may include—

(1) acquisition of (i) a slum area or a deteriorated or deteriorating area, or (ii) land which is predominantly open and which because of obsolete platting, diversity of ownership, deterioration of structures or of site improvements, or otherwise, substantially impairs or arrests the sound growth of the community, or (iii) open land necessary for sound community growth which is to be developed for predominantly residential uses: *Provided*, That the requirement in paragraph (a) of this section that the area be a slum area or a blighted, deteriorated or deteriorating area shall not be applicable in the case of an open land project;

(2) demolition and removal of buildings and improvements;

(3) installation, construction, or reconstruction of streets, utilities, parks, playgrounds, and other improve-

ments necessary for carrying out in the urban renewal area the urban renewal objectives of this subchapter in accordance with the urban renewal plan;

(4) disposition of any property acquired in the urban renewal area (including sale, initial leasing or retention by the local public agency itself) at its fair value for uses in accordance with the urban renewal plan; * * *

(6) acquisition of any other real property in the urban renewal area where necessary to eliminate unhealthful, insanitary or unsafe conditions, * * * or otherwise to remove or prevent the spread of blight or deterioration, or to provide land for needed public facilities. * * *

* * *

"In addition to all other powers hereunder vested, where land within the purview of clause (1) (ii) or (1) (iii) of the first paragraph of this subsection (whether it be predominantly residential or nonresidential in character) is to be redeveloped for predominantly nonresidential uses, loans and advances under this subchapter may be extended therefor if the governing body of the local public agency determines that such redevelopment for predominantly nonresidential uses is necessary and appropriate to facilitate the proper growth and development of the community in accordance with sound planning standards and local community objectives and to afford maximum opportunity for the redevelopment of the project area by private enterprise; * * *."

New York General Municipal Law, Section 72-k.

"1. The governing board or other appropriate authority of a municipal corporation may acquire by purchase, gift, devise, lease, condemnation or otherwise, in accordance with the provisions of any appropriate general, special, or local law applicable to the acquisition, of real property

by such municipal corporation, real property or any in-
terest therein necessary for or incidental to the clearance,
replanning, reconstruction, and neighborhood rehabilita-
tion of substandard and insanitary areas, together with
adequate provision for recreational and other facilities
appurtenant thereto.

"2. In addition to employing any other lawful method
of utilizing or disposing of any real property or any in-
terest therein owned by a municipal corporation, or ac-
quired by it pursuant to subdivision one of this section,
such municipal corporation, acting through its board of
estimate or other governing body, may sell, lease for a
term not exceeding ninety-nine years, or otherwise dispose
of any such real property to any person, firm, or corpora-
tion at the highest marketable price or rental at public
auction or by sealed bids pursuant to the provisions of
any general, special or local law applicable to the sale or
disposition of real property by such municipal corpora-
tion, for the purpose of clearance, replanning, reconstruc-
tion and neighborhood rehabilitation by the purchaser of
such real property in substandard and insanitary areas
in such manner as may be prescribed by the board of esti-
mate or other governing body. Any deed, lease or instru-
ment by which real property or any interest therein is
conveyed or disposed of in such manner shall contain pro-
visions requiring the purchaser or grantee to clear, replan,
reconstruct or rehabilitate such property in such manner
as may be prescribed by the board of estimate or other
governing body, and provisions insuring the use of such
real property for purposes consistent with the clearance,
replanning, reconstruction and neighborhood rehabilitation
of substandard and insanitary areas. Such deed or instru-
ment may contain such other provisions, conditions and
restrictions, including specifications relating to clearance,
replanning, reconstruction, and rehabilitation as may be
prescribed by the board of estimate or other governing
body. The prior consent of the city planning commissio

or other analogous body of such municipal corporation shall be required for the acquisition of property by such municipal corporation for the purposes of this subdivision, which prior consent shall be based upon a finding made by such city planning commission or other analogous body after a public hearing thereon, that such acquisition is necessary for the clearance, replanning, reconstruction and neighborhood rehabilitation of real property in a sub-standard and insanitary area.

"3. In proceeding under this section in addition to all other powers which it may exercise, a municipal corporation, acting through its board of estimate or other governing body, may: (1) cooperate with the federal government and apply for and accept financial assistance, loans and grants, as provided in title I of the housing act of nineteen hundred forty-nine and all federal laws amendatory and supplemental thereto; * * *"

APPENDIX "B"

STATE OF NEW YORK

COURT OF APPEALS

No. 87

64TH ST. RESIDENCES, INC. and 89 AMSTERDAM AVENUE CORPORATION, suing under Section 51, General Municipal Law, & ors.,&c., *Appellants*,

v.

CITY OF NEW YORK, & ors.,&c., *Respondents*,

FORDHAM UNIVERSITY, & ors., *Intervenors-Respondents*.

Opinion for Affirmance

DESMOND, J.:

Plaintiffs are owners and tenants of real property in the so-called "Lincoln Square Project" area on the west

side of Manhattan running from 60th Street to 70th Street, bounded on the east and west by various streets and consisting altogether of thirteen city blocks. Beginning in 1954, by appropriate actions of various of its public officers and bodies, the city, as authorized by section 1 of article XVIII of the State Constitution and section 72-k of the General Municipal Law (see *Kaskel* v. *Impellitteri*, 306 N. Y. 73, certiorari denied 347 U. S. 934), found the Lincoln Square area to be "substandard and insanitary", approved a plan for renewal thereof and ordered its acquisition by the city through condemnation. To secure a grant of Federal moneys pursuant to the National Housing Act (12 U. S. Code, § 1701 et seq.), the city's Board of Esti.. .te presented to the Federal Urban Renewal Administration the city's proposal for the "Lincoln Square Urban Renewal Project". Before such presentation the city had obtained and had included in the plan agreements by various "sponsors". Among those sponsors are intervenors Fordham University and Lincoln Center for the Performing Arts, Inc., a newly formed membership corporation with the principal function of promoting the musical and dramatic arts.

Each such sponsor agreed, as part of the Urban Renewal Plan, to bid, at the auction provided for by section 72-k of the General Municipal Law, a stated minimum price and, if it should be the successful bidder, to relocate the prior occupants, clear its part of the site and redevelop that part as required by the plan, with buildings to be approved by the city. Fordham University agreed as such sponsor to bid, for the two-block part set aside for "educational purposes", at least $2,241,610, or $7 per square foot, which was higher than the "re-use value" fixed by any of several appraisals. The city on its part agreed to acquire that allotted part (as well as the rest of the area) by condemnation, and, if Fordham University should be successful at the auction, to convey that part to the university at the auction price with the city taking back a purchase-

money mortgage for part of the price. Other sponsors made separate agreements which need not be described in detail. The Federal Housing and Home Finance Agency then approved the whole project and plan. The consequence of such approval is, under the Federal statutes (42 U. S. Code, § 1450 et seq.), that the Federal Government will pay two thirds of the difference between what the city pays for this land and the amount realized at the auction. The city itself must stand the other third.

After the plan had been approved, as above described, plaintiffs brought this present suit to invalidate the plan and to enjoin the city from carrying it out. The theory of the complaint is that the resale of part of this area to Fordham University, a Roman Catholic institution, at a price lower than the price paid for that part by the city will be a direct subsidy of a sum in excess of three and a half million dollars in violation of section 7 of article I of the New York State Constitution and of the First and Fourteenth Amendments to the United States Constitution, each of which constitutional provisions, say plaintiffs, forbids grants of public moneys to denominational institutions. After the institution of this suit the city, on February 28, 1958, took title to the project area by condemnation and conducted the auction at which Fordham University was the only bidder (at the previously negotiated price) for that part of the area which had been reserved for collegiate or educational purposes. Although the principal acts which the plaintiffs seek to enjoin have thus been performed, that in itself would be no bar to the further prosecution of the action, at least as praying for a declaratory judgment.

Special Term denied the motion of plaintiffs for a temporary injunction and for summary judgment and granted the motion of the defendants and intervenors under rules 112 and 113 of the Rules of Civil Practice for dismissal of the complaint on the ground that it does not state a

cause of action. Appellate Division, First Department, unanimously affirmed without opinion, judgment of dismissal was entered thereon, and plaintiffs appeal to this court as of right, presumably on constitutional grounds (Civ. Prac. Act, § 588, subd. 1, cl. [a]).

Plaintiffs say that the condemnation of this land and the sale thereof to the university is completely void because Fordham is a denominational school and the sale to it, according to plaintiffs, at $7 per square foot of land for which the city paid about $16 per square foot would thus be an unconstitutional grant or subsidy of public moneys to a religious corporation. The argument, however, proceeds on an assumption false in fact. Plaintiffs say that because the city arranged to sell this land at a price much below what the city paid for it, this necessarily amounts to a subsidy or gift. But what the city bought is not the same as what Fordham bought. The city bought land and buildings. Fordham bought the same property but subject to its agreement to raze the buildings, relocate the tenants and use the cleared land for a collegiate campus and buildings only. What Fordham was paying for was the re-use value of the land. There is in this record no dispute of the fact, found by both courts below, that the $7 per square foot which Fordham agreed to bid, and did bid, is at least equal to the re-use value as established by several appraisals, all of which reported figures lower than $7 per square foot. Therefore, there is no substance to the assertion, on which this whole suit depends, that Fordham is getting a gift, grant or subsidy of public property. It is, of course, getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay than if it had to negotiate with all the private owners, but the private owners are getting from the city the full value of the property in its present condition and use. The city benefits by the achievement of its valid municipal purpose of eliminating a slum. The State and

Federal statutes contemplate that the purchaser from the city will pay less than the city has paid since it will always be the case that the city is buying land and buildings and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes.

Any collegiate institution could have been a bidder at the auction Special Term pointed out, probably correctly, that Fordham would be deprived of constitutional rights if it alone were excluded from the bidding. Perhaps this is only another way of saying that, since this sale is an exchange of considerations and not a gift or subsidy, no "aid to religion" is involved and a religious corporation cannot be excluded from bidding.

At some points in their argument plaintiffs seems to be questioning the validity of the whole system of selling these properties at auctions where there is little likelihood of competing bids. That contention must be rejected (see *Kassel* v. *Impellitteri*, 306 N. Y. 73, 95, *supra*—dissenting opinion but representing the whole court's views on that question; and see *Bleecker* v. *Wagner*, 286 App. Div. 828, motion for leave to appeal denied 309 N. Y. 1029).

The judgment should be affirmed, with costs.

• • •

Judgment affirmed, with costs. Opinion by Desmond, J. All concur.

APPENDIX "C"

No. 87

64TH ST. RESIDENCES, INC. and 89 AMSTERDAM AVENUE CORPORATION, suing under Section 51, General Municipal Law, & ors.,&c., *Appellants*,

v.

CITY OF NEW YORK, & ors.,&c., *Respondents*,

FORDHAM UNIVERSITY, & ors., *Intervenors-Respondents*.

BE IT REMEMBERED, That on the 13th day of March in the year of our Lord one thousand nine hundred and fifty-eight, 64th St. Residences and 89 Amsterdam Avenue Corportion, suing under Section 51, General Municipal Law, & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Harris L. Present, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The City of New York, & ors., &c., the residents and Fordham University, & ors., the intervenors-respondents in said cause, afterwards appeared in said Court of Appeals by Peter Campbell Brown, Saxe, Bacon & O'Shea, & ors., their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Harris L. Present, of counsel for the appellants, and by Mr. Anthony Curreri, of counsel for the respondents, and by Mr. Porter R. Chandler, of counsel for the intervenor-respondent Fordham University, and by Mr. William Eldred Jackson, of counsel for the intervenor-respondent Lincoln Center, submitted by the intervenor-respondent Webb & Knapp, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate

Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE
Albany, May 1, 1958

(SEAL)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON
Clerk.